No. 07-1036

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In The
Supreme Court of the United States

T-MOBILE USA, INC.,

Petitioner,

vs.

BRUCE GATTON, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The Court Of Appeal Of The State Of California, First Appellate District, Division Five

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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STATEMENT OF THE CASE

The appellate decision below arose out of coordinated litigation pending in the Alameda County (California) Superior Court. In that litigation, respondents allege that T-Mobile imposes early termination fees on its cellular telephone subscribers in a manner inconsistent with provisions of California law. Respondents Christina Nguyen and Adrianne Grant also challenge T-Mobile's practice of locking its cellular telephone handsets to prevent those handsets from being activated on the networks of other compatible carriers. Respondents assert, *inter alia*, state law consumer protection claims on behalf of classes of current and former subscribers to T-Mobile service.

In July 2005, nearly two years after this action commenced, T-Mobile filed a motion to compel arbitration of all claims asserted against it by respondents. On September 7, 2005, the Superior Court denied that motion, finding that T-Mobile's arbitration provisions were procedurally and substantively unconscionable under California law and therefore unenforceable. Pet. App. 50a-60a.

On June 22, 2007, relying on *Discover Bank v. Superior Court*, 113 P.3d 1100 (Cal. 2005), the California Court of Appeal affirmed the Superior Court's ruling that T-Mobile's arbitration provision was unconscionable and therefore unenforceable under California law. Pet. App. 8a-24a. The Court of Appeal also rejected T-Mobile's argument that the Federal Arbitration Act preempted the rule that class action

waivers are unconscionable under California law under some circumstances. *Id.* at 24a-27a.

On August 1, 2007, T-Mobile filed a petition for review with the California Supreme Court. The California Supreme Court denied review on October 10, 2007. Pet. App. 61a.

I. THE COURT SHOULD DENY THIS PETITION, NOT HOLD IT PENDING DISPOSITION OF THE UNRELATED PETITION IN *LASTER*, BECAUSE THE ISSUES RAISED ARE DIFFERENT AND NEITHER CASE IS SUITABLE FOR THIS COURT'S REVIEW

T-Mobile's sole request for relief from this Court is that this petition be held "pending the Court's disposition of *T-Mobile USA, Inc. v. Laster*, No. 07-976 (filed Jan. 23, 2008), and then disposed of accordingly." Petition at 11. T-Mobile states the "Question Presented" by this petition as "[w]hether this petition for certiorari should be held pending this Court's disposition of the petition for certiorari previously filed in [*Laster*] . . . " Petition at (i). T-Mobile argues that the "issue presented in this case is the same as the one squarely presented in" the *Laster* petition (*id.* at 10), and that the Court should grant the *Laster* petition, while holding this case until resolution of that one. *Id.* at 10-11.

However, petitioner ignores an important distinction between the question raised by the *Laster* petition and the ruling below in this case: *Laster* is a

petition from a ruling of a federal Court of Appeals, while this case involves a ruling by a middle level state appellate court. This is an important and possibly outcome-determinative distinction. *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 449 (2006) (Thomas, J., dissenting) (reiterating view that the Federal Arbitration Act does not apply to proceedings in state court).

The *Laster* petition itself recognizes the importance of the identity of the court in which an FAA preemption question arises. The "question presented" in that petition (drafted by the same counsel, on behalf of the same party, as this petition) is explicitly phrased to focus attention on the status of the court below as within the federal judicial system: "Whether, under the Federal Arbitration Act, *a federal court* may refuse to enforce the terms of an agreement to arbitrate based upon a state-law policy that individual arbitration is unconscionable in cases involving small claims by a consumer." Petition For a Writ of Certiorari, No. 07-976, at (i) [emphasis added]. Resolution of *that* question will not govern the result in this state court case.

Nor should the Court consider accepting this petition on its merits. Every prudential consideration weighs against review. The decision below was issued by a state intermediate appellate court. The case remains on-going at the trial court level, with no final judgment and this Court's jurisdiction is doubtful. *See* 28 U.S.C. §1257 (vesting jurisdiction in this Court to review "final judgments or decrees rendered by the

highest court of a State"). Moreover, it is part of a cluster of consolidated, related cases involving extensive and complex prior procedural rulings. Pet. App. 2a, n. 1, 5a-7a; *see also*, *Meoli v. AT&T Wireless Servs.*, 2005 Cal. App. Unpub. LEXIS 8994 at *1-*6 (Cal. Ct. App. 2005). As T-Mobile admits, such a case is not an ideal candidate for this Court's consideration of the issue raised by the Petition. Petition at 10-11.

In addition, the specific wording of T-Mobile's arbitration provision makes this case (and, for that matter, the *Laster* case which involves the identically-worded language) a poor vehicle to address any preemption issue under the Federal Arbitration Act. First, T-Mobile's arbitration agreement includes language *repudiating* arbitration if any court or arbitrator finds that the agreement's prohibition on class action procedures is unenforceable. Pet. App. 63a-64a; Pet. App. in *Laster* 37a-38a.[1] It is solely because of this language, drafted by T-Mobile, that the trial court below denied outright T-Mobile's motion to compel rather than sending the case to arbitration, potentially on a classwide basis. Pet. App. 58a. The orders of the courts below neither evidenced "hostility" to arbitration nor ordered a dispute resolved in a

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[1] "If a court or arbitrator determines that your waiver of your ability to pursue class or representative claims is unenforceable, the arbitration agreement will not apply and our dispute will be resolved by a court of appropriate jurisdiction, other than a small claims court." *Id.* (capitalization omitted).

judicial forum which the parties had agreed to be resolved in an arbitration. *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468 (1989). Instead, after applying generally applicable California law precluding contractual bans on class actions in small claim cases, the courts below *implemented* the contractual demand by T-Mobile that the action proceed in court, not arbitration.

Second, as explained in the *amicus* brief filed by AT&T Mobility in the *Laster* case, T-Mobile's arbitration provision is unclear on a customer's entitlement to recover attorneys fees after prevailing in arbitration. Brief Of AT&T Mobility LLC As Amicus Curiae In Support Of Neither Party, filed in No. 07-976, at 19-21. T-Mobile assumes in its petition in *Laster* that its arbitration language allows for such an award of attorneys fees (*Laster* Petition at 13) and cites cases finding the prevailing party's right to recover fees to be a relevant factor in determining enforceability of an arbitration provision (*id.* at 21-22). Definitive construction of the language in question would be required to address T-Mobile's arguments in these petitions. In neither this case, nor *Laster*, however, have the lower courts yet interpreted the scope and meaning of the language at issue.

II. THE COURT SHOULD DENY THE PETITION IN *LASTER* AS WELL AS THIS PETITION

Because T-Mobile asks the Court to hold this petition pending resolution of the *Laster* petition, we address the reasons why the Court should not accept the *Laster* case, and perforce this case, for review.

A. The Decision In *Laster* And The California Cases On Which It Relied Present No Threat To The Continued Vigorous Implementation Of The FAA's Policy Favoring Enforcement Of Arbitration Agreements

T-Mobile contends that the Ninth Circuit's decision in the *Laster* case, and similar decisions by other state and federal courts, pose a dire threat to the policy stated in the Federal Arbitration Act, as construed by this Court, favoring enforcement of arbitration agreements. T-Mobile characterizes these decisions as refusing to honor the parties' pre-dispute contractual choice of arbitration rather than litigation and suggests that they will lead to widespread migration of business/consumer cases from an arbitration forum to a judicial forum. *Laster* Petition 12-14. These contentions do not withstand scrutiny.

The policy of the State of California, like that embodied in the FAA, favors enforcement of arbitration agreements. *Wagner Construction Co. v. Pacific Mechanical Corp.*, 41 Cal.4th 19, 25, 157 P.3d 1029

(Cal. 2007) (California Arbitration Act represents a "strong public policy in favor of arbitration"); *Moncharsh v. Heily & Blase*, 3 Cal.4th 1, 9, 832 P.2d 899 (Cal. 1992) (same).[2] Indeed, California's pro-arbitration policy *pre-dates* passage of the FAA by Congress in 1925. *See, e.g., Utah Const. Co. v. Western Pac. Ry. Co.*, 174 Cal. 156, 159, 162 P. 631 (Cal. 1916) ("The policy of the law in recognizing arbitration agreements and in providing by statute for their enforcement is to encourage persons who wish to avoid delays incident to a civil action to obtain an adjustment of their differences by a tribunal of their own choosing."). Thus, any suggestion that either California's Legislature or its courts are generally hostile to arbitration or the goals of the FAA is clearly unwarranted.

California also has a strong public policy against exculpatory contractual provisions. California Civil Code section 1668 provides: "All contracts which have for their object, *directly or indirectly*, to exempt anyone from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law." (Emphasis added.) This statute has represented the State's policy since 1872,

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[2] Echoing Section 2 of the FAA, Cal. Code of Civil Procedure section 1281 provides: "A written agreement to submit to arbitration an existing controversy or a controversy thereafter arising is valid, enforceable and irrevocable, save upon such grounds as exist for the revocation of any contract."

when it was enacted. Where the small size and/or large cost associated with a particular claim render individual adjudication economically impractical, a contractual provision requiring such individual adjudication is unenforceable under the California statute. *America Online, Inc. v. Superior Court*, 90 Cal.App.4th 1, 108 Cal. Rptr. 2d 699 (Cal. Ct. App. 2001). This application of the state policy against exculpatory clauses has nothing whatever to do with arbitration – rather, it is an implementation of the generally applicable rule that contractual waivers of class or group adjudication are unenforceable *if* they act as the essential equivalent of an exculpatory clause. *Id.* at 17-18 (contractual forum selection clause unenforceable because honoring it would preclude consumer class action; no arbitration clause at issue).[3]

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[3] The recognition by the California courts that the absence of class action procedures will effectively preclude recovery for aggrieved persons with small claims in some circumstances is long-held. *Blue Chip Stamps v. Superior Court*, 18 Cal.3d 381, 387, 556 P.2d 755 (Cal. 1976) (Tobriner, J., concurring) ("A company which wrongfully exacts a dollar from each of millions of customers will reap a handsome profit; the class action is often the only effective way to halt and redress such exploitation.").

This Court has come to the same conclusion on numerous occasions. *See, e.g., Amchem Products, Inc. v. Windsor* 521 U.S. 591, 617 (1997) ("'The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor.'");

(Continued on following page)

Despite T-Mobile's arguments otherwise, the California judicial decisions, which the Ninth Circuit in *Laster* and *Shroyer v. New Cingular Wireless Servs., Inc.*, 498 F.3d 976 (9th Cir. 2007) followed when applying California law in those diversity cases, did not invalidate the parties' choice of arbitration over litigation. Instead, the California Supreme Court expressly stated its intention to *enforce* the contractual requirement that the parties arbitrate their disputes in those cases – invalidating only the portion of the contractual language which was contrary to the generally-applicable contract doctrine described above. *Gentry v. Superior Court*, 42 Cal.4th 443, 451 (Cal. 2007) (classwide *arbitration* of employees' statutory labor claims allowed if individual arbitration found infeasible; declining to hold that all class action waivers in employment contracts are unenforceable); *Discover Bank v. Superior Court*, 36 Cal.4th 148, 152-153 (Cal. 2005) (consumer plaintiff entitled to pursue classwide *arbitration* despite language in arbitration clause requiring individual arbitration proceedings).

For that reason, the rulings by the Ninth Circuit in *Laster* and the California courts below in the instant case would have been to send *these* cases to

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Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 339 (1980) ("Where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device.").

arbitration (with the potential for classwide prosecution) but for one fact – as noted above, T-Mobile's own contract language precluded it. It is thus T-Mobile's own distrust of arbitration in representative actions that has left these cases in a litigation rather than arbitration mode. While T-Mobile is presumably free to elect to forgo arbitration for that category of cases by so phrasing its contracts with its customers, it cannot credibly contend that it is its customers who are the "anti-arbitration" parties in this dispute. Following this Court's decision in *Green Tree Financial Corporation v. Bazzle*, 539 U.S. 444 (2003), the major arbitration providers have enacted rules to handle such cases and class arbitrations have become relatively common. The largest provider, the American Arbitration Association, currently lists 227 class arbitrations on its website.[4] And this Court has consistently rejected any argument that arbitrators are inherently less capable of resolving complex, large-scale disputes than are the courts. *Shearson/American Express v. McMahon*, 482 U.S. 220, 239 (1987) (RICO claims subject to arbitration); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 633 (1985) (international antitrust dispute suitable for arbitration; "potential complexity should not suffice to ward off arbitration").

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[4] http://www.adr.org/sp.asp?id=25563 and successive pages [last visited on April 17, 2008].

T-Mobile argues that the benefits of arbitration depend upon the ability to resolve claims relatively quickly through individual arbitration as opposed to an undoubtedly longer and more involved classwide arbitration. *Laster* Petition 4, 12-13. But this argument compares apples to oranges. While any *particular* customer claim might be resolved more expeditiously and at lower cost in an individual arbitration than in a classwide proceeding, the correct comparison is between the *total* cost and time commitment required to resolve the thousands or tens of thousands of customer claims in individual arbitration proceedings as opposed to one classwide proceeding. Obviously, the goals of efficiency and expediency are *furthered* not hindered by group adjudication. Similarly, T-Mobile presents no evidence, or even logic, to support any argument that classwide arbitration is not likely to be quicker and less expensive than class adjudication. The advantages of arbitration over litigation apply to class proceedings as well as individual ones.

T-Mobile's real reason for seeking to avoid class adjudication (whether in arbitration or in court) is precisely the one identified by the California courts as contrary to state public policy: The practical result of no classwide procedures for resolving these small claims is no resolution at all, thus effectively shielding T-Mobile from the wrongs alleged against it. This desire has nothing whatsoever to do with preference for arbitration; it has everything to do with attempting to avoid liability. T-Mobile used the mechanism of a pre-dispute arbitration clause as a vehicle to seek to

exculpate itself from liability for small value claims. The California decisions challenged herein have quite properly differentiated between the legitimate goal of resolving disputes in arbitration and the illegitimate goal (under State law) of contractually immunizing one's self from liability for violations of law. Other states may come to contrary conclusions under the state laws existing therein. However, California has long held a policy precluding such contractual immunization, whether sought to be achieved "directly or indirectly." Cal. Civil Code §1668.

B. T-Mobile's Contention That The *Gay* Case Presents A Conflict Justifying Grant Of The *Laster* Petition Is Not Well-Taken

T-Mobile relies heavily on the recent decision in *Gay v. Creditinform*, 511 F.3d 369 (3d Cir. 2007) which, T-Mobile asserts, has created a conflict among the Courts of Appeals on the question whether the FAA preempts a state law rule that class action bans in arbitration clauses are unconscionable. *Laster* Petition at 2-3, 18-20. On closer scrutiny, however, the *Gay* case presents no conflict worthy of this Court's review. Based on a contractual choice of law provision, the court held that the arbitration provision at issue was not unconscionable under Virginia state law. 511 F.3d at 390-392. While this was sufficient to dispose of the case, the court proceeded to address Pennsylvania law, which the plaintiff urged should be applied. The *dicta* relied upon by T-Mobile is based upon

the *Gay* court's questionable interpretation of two Pennsylvania state lower court decisions. The *Gay* court characterized these Pennsylvania decisions as running afoul of this Court's admonishment in *Perry v. Thomas*, 382 U.S. 483, 492 n. 9 (1987) that a state law contract defense to an arbitration clause must not be grounded in a unique attribute of arbitration itself. 511 F.3d at 395.

The *Gay* decision does not create a conflict worthy of this Court's attention for at least two reasons. First, the *Gay* court viewed Pennsylvania law as choosing judicial resolution over arbitral resolution of small value claim cases, because it interpreted the state decisions at issue as protecting the right to bring a class action in court in such situations. 511 F.3d at 393. If this was an accurate understanding of Pennsylvania law, that law differs dramatically from the California law at issue in *Laster* and this case. As previously discussed, California law *favors* arbitration and enforces arbitration agreements to the maximum extent possible by ordering small value cases covered by such agreements to class arbitration. The *Gay* decision never addresses the viability of a state law rule preferring class *arbitrations* to individual arbitrations where class resolution is the only practical way for consumers to vindicate their statutory rights. It certainly did not hold that such a preference would be preempted by the FAA. Nor would that court's logic make sense in the context of California law, where judicial decisions have applied the unconscionability doctrine at issue to contracts

without any arbitration clause at all, thus clearly undermining any suggestion that the state rule discriminates against arbitration or takes its meaning from the arbitration clause itself. *America Online, Inc., supra.*

Second, the *Gay* decision is quite recent and it is far from clear that it represents the view even of the Third Circuit itself. Both before and after *Gay*, the Third Circuit has issued decisions addressing FAA preemption which are completely consistent with that of the approach used by the Ninth Circuit in *Laster*, *Shroyer* and *Lowden v. T-Mobile USA, Inc.*, 512 F.3d 1213, 1221 n. 3 (9th Cir. 2008). *See*, *Zimmer v. Cooperneff Advisors, Inc.*, ___ F.3d ___, 2008 U.S. App. LEXIS 8357 (3d Cir. April 14, 2008); *Delta Funding v. Harris*, 426 F.3d 671 (3d Cir. 2005). In both of those decisions, the Third Circuit expressly looked to applicable state law to determine whether or not particular arbitration language was or was not unconscionable. Neither decision even hints that it might be the position of that Circuit that such determinations must be made without examination of the terms of the arbitration provision itself. And notably, the *Zimmer* opinion does not even cite *Gay*, despite the fact that it discusses the very same Pennsylvania lower court decisions which the *Gay* court discussed. A decision by this Court to address an alleged conflict among the Circuits should be based on firmer ground. The issue should be left to percolate further in the Third Circuit to allow that Court to resolve any internal conflicts in its approach to FAA preemption.

C. This Court's Decisions Make Clear That The Application Of Generally-Applicable State Law Contract Doctrines To Arbitration Provisions Is Not Preempted By The FAA

A final reason why this Court should not adopt T-Mobile's request that its petition in this case be granted and held pending resolution of *Laster*, is that this Court would almost certainly affirm the Ninth Circuit in *Laster* if it decided to accept the petition in that case. Thus, holding the petition in this case would be an empty and unnecessary act.

Section 2 of the FAA provides that agreements to arbitrate disputes shall be enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract." This Court's decisions make clear that generally applicable *state* contract enforcement rules provide the means for determining whether grounds "for the revocation of any contract" exist. "[S]tate law may be applied if that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally. Thus, generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening § 2." *Doctor's Assocs. v. Casarotto*, 517 U.S. 681, 686-687 (1996) (quotation marks and citation omitted). However, to protect the FAA's intention that contracts to arbitrate be put "upon the same footing as other contracts" (*Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 511 [1974] [quoting H. R. Rep. No. 96, 68th Cong., 1st

Sess., 1, 2 (1924)]), a state may only apply generally applicable contract law when determining the enforceability of an arbitration agreement. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 281 (1995).

Under these standards, there is no meaningful argument that the California Supreme Court's decision in *Discover Bank* is preempted by the FAA.[5] That decision did not preclude arbitration of the dispute raised in the case; to the contrary, the court expressly upheld the obligation of the parties to proceed to arbitration. While the court found unenforceable the portion of the contractual language which limited arbitration proceedings to individual resolution, it did so pursuant to a long-held generally applicable state contract doctrine – contractual provisions which directly or indirectly result in exculpation are not enforced in California. Cal. Civil Code §1668. Nor can there be any suggestion that the *Discover Bank* court singled out arbitration for special application of this doctrine, since the same conclusion (that contractual bars to group adjudication in small claim consumer cases are contrary to state public policy) was earlier

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[5] The ruling of the Ninth Circuit in *Laster* and the ruling of the California Court of Appeal in this case merely apply the *Discover Bank* decision to the cases before them in a non-controversial manner. As noted above, these two courts ordered the cases to proceed in court rather than arbitration only because T-Mobile's own contractual language required that result. Under *Discover Bank*, the cases would have been sent to arbitration for consideration of the possibility of class arbitration, but for T-Mobile's election otherwise.

applied in a case where no arbitration clause existed. *America Online, Inc., supra.*[6]

T-Mobile's petition in *Laster* suggests that it would ask this Court to find that the *Discover Bank* holding is preempted by the FAA because arbitration agreements should be "enforced according to their terms", thus purportedly protecting an arbitration clause's specification of "individual" resolution from application of generally applicable state contract doctrines. *Laster* Petition 12, 28 (quoting *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989)). This argument cannot prevail, however.

The Court's opinion in *Volt Information Sciences* leaves no doubt that the FAA's preference for enforcement of arbitration agreements "according to their terms" is simply a subset of the FAA's *overall* purpose that arbitration agreements be enforced as are other contracts. Immediately before the language quoted by T-Mobile, the Court stated: "[The FAA] simply requires courts to enforce privately negotiated

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[6] In *America Online*, the California court addressed a forum selection clause designating a Virginia forum and application of Virginia law. The court reviewed the significance of class action procedures for vindication of consumer rights under California law and concluded: "The unavailability of class action relief in this context is sufficient in and by itself to preclude enforcement of the TOS forum selection clause." Because there was no arbitration provision in the contract at issue in the case, the court's decision cannot possibly be attacked as hostile to arbitration or based upon any unique attribute of arbitration.

agreements to arbitrate, like other contracts, in accordance with their terms. *See Prima Paint*, *supra*, at 404, n. 12 (the Act was designed 'to make arbitration agreements as enforceable as other contracts, but not more so')." 489 U.S. at 478. This "central purpose" of the FAA is implemented in Section 2 of the Act. *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2003). But, of course, Section 2 is also precisely where the express limit on the enforceability of arbitral provisions is stated: " . . . save upon such grounds as exist at law or in equity for the revocation of any contract". 9 U.S.C. §2. Application of generally applicable state defenses to contract enforceability remains proper whether that application impacts the precise manner in which an arbitration proceeds or the enforceability of the agreement to arbitrate at all.

Put simply, the FAA's policy in favor of enforcing the specific terms of arbitration agreements has limits.[7] The main such limit is that those terms are subject to general state contract defenses, including

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[7] Recently, this Court found that contractual agreement to expanded judicial review of an arbitrator's rulings must give way to the FAA's own specified limits on such review. *Hall St. Assocs. v. Mattel, Inc.*, ___ U.S. ___, 170 L.Ed.2d 254 (2008). In response to the argument that the FAA generally favors enforcement of the terms of arbitration agreements, the Court stated: "But to rest this case on the general policy of treating arbitration agreements as enforceable as such would be to beg the question, which is whether the FAA has textual features at odds with enforcing a contract to expand judicial review following the arbitration." *Id.*, 170 L.Ed.2d at 264.

unconscionability. *Doctor's Assocs., supra*. Thus, for example, numerous courts have found the specification of an unreasonable forum in an agreement to arbitrate to be unconscionable if the cost of proceeding in that forum would act as a practical bar to any resolution of the dispute. *See, e.g., Bragg v. Linden Research, Inc.*, 487 F. Supp. 2d 593, 609 (E.D. Pa. 2007) (unreasonable forum for arbitration, together with unreasonable confidentiality provisions and required sharing of arbitration fees and costs, render agreement substantively unconscionable; applying California law); *Plattner v. Edge Solutions, Inc.*, 2004 U.S. Dist. LEXIS 13451 (N.D. Ill. April 1, 2004) (contractual requirement to arbitrate in New York unenforceable because "the forum selection clause effectively precludes plaintiff from bringing his claim"); *Hagedorn v. Veritas Software Corp.*, 250 F. Supp. 2d 857, 862 (S.D. Ohio 2002) (portion of arbitration agreement requiring Ohio resident to arbitrate in San Francisco is not enforceable); *Philyaw v. Platinum Enters.*, 54 Va. Cir. 364, 366 (Va. Cir. Ct. 2001) (clause requiring arbitration in a distant forum unconscionable under Virginia law where the cost of doing so "effectively eliminates any remedy for consumers"). *Cf. Mitsubishi Motors Corp., supra*, 473 U.S. at 637 n. 19 ("[I]n the event the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations, we would have little hesitation in condemning the agreement as against public policy.").

Nor could T-Mobile successfully contend that the California courts should have come to a different conclusion regarding the exculpatory object of the wording of their contractual language. Whether the wording of a particular contractual provision does or does not show that it has the object "directly or indirectly, to exempt anyone from liability" for a violation of law (Cal. Civil Code §1688) is a question of *state* law. *Volt Information Sciences,* 489 U.S. at 473 ("the interpretation of private contracts is ordinarily a question of state law, which this Court does not sit to review."). The FAA protects against State law applications grounded directly in arbitration *qua* arbitration and against outright discrimination against such clauses. But in the absence of either such practice, as here, the interplay between particular contractual provisions and state statutory policies remains an issue of state concern. The California Supreme Court determined that, in some factual circumstances, a contractual ban on group resolution of small claims falls within the state statutory prohibition on exculpatory contract provisions. Since that court decided that such cases should still be sent to arbitration, but with the possibility of group resolution intact, no substantial federal question is raised, under the FAA or otherwise. There is no federal policy favoring arbitration under a certain set of procedural rules. *Id.* at 476.

CONCLUSION

Respondent respectfully requests that the Court deny the Petition For A Writ Of Certiorari.

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Respectfully submitted,

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